No. 10169.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FOX WEST COAST AGENCY, a corporation,

Appellant,

vs.

JEAN L. FORSYTHE,

Appellee.

OPENING BRIEF FOR APPELLANT, FOX WEST COAST AGENCY, A CORPORATION.

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Parker & Baird Company, Law Printers, Los Angeles

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Jurisdictional Statement.

This is an appeal from a final judgment at law entered by the United States District Court for the Southern District of California, Central Division, in an action for damages by reason of bodily injuries arising out of an injury sustained by the appellee on the 24th day of March, 1940, in a theater located in the City of Los Angeles and known as the United Artists Theater, at which time and place the plaintiff sat in a seat for the purpose of viewing a motion picture and certain of the metal parts of said seat were snapped apart.

The record on appeal in this case was prepared pursuant to Rule 76 of the Rules of Civil Procedure. The

action was originally commenced in the Superior Court of the State of California in and for the County of Los Angeles on December 20, 1940. The parties to said action are: Jean L. Forsythe, plaintiff, vs. Fox West Coast Agency, a corporation; John Doe Company, a corporation; Richard Roe, Ltd., a corporation; John Doe, Richard Roe and Jane Doe, defendants, as named in the original complaint when filed in said Superior Court. A copy of summons and complaint while the action was pending in said Superior Court was served upon the defendant, Fox West Coast Agency Corporation, a corporation.

On June 18, 1941, pursuant to the provisions of the judicial code in such cases made and provided, the said action was, upon petition of the defendant, Fox West Coast Agency Corporation, a corporation, removed to the District Court of the United States, Southern District of California, Central Division.

On September 18, 1941, pursuant to a motion made by the appellee at said time, an order was made granting the appellee leave to file an amended complaint. [Tr. pp. 1 and 2.]

The case was tried in the United States District Court upon the issues raised by the amended complaint, and the answer thereto filed on behalf of the appellant, Fox West Coast Agency, a corporation, and the defendant, Fox West Coast Theatres Corporation, a corporation. Said amended complaint alleged that said defendants immediately hereinabove referred to were on the 24th day of March, 1940, engaged in the business of operating and maintaining the motion picture theatre known as the United Artists Theater; that on said date

the plaintiff paid to and the said defendants accepted an admission fee, entitling the appellee to enter said theater, and that by reason of alleged actionable negligence on the part of the defendants and each of them, the appellee sustained bodily injuries and consequential damage.

Paragraphs I, II and III of the amended complaint relate solely and exclusively to the organization and existence of the defendants, Fox West Coast Agency Corporation, a corporation, Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, the fact that said corporations were and each thereof was duly licensed, to do business in the State of California, and the fact that each was organized and existed pursuant to the laws of a state other than the State of California. [Tr. p. 140.]

Said amended complaint also alleged "the requisite jurisdictional facts consisting of diversity of citizenship and amount of damages claimed." [Tr. p. 2.]

The answer filed by the appellant to the amended complaint denied all of the material allegations of the complaint, and specifically denied that the appellant, Fox West Coast Agency Corporation, a corporation, was at any time in the business of operating and maintaining the United Artists Theater, and allege that it was merely an agent of the defendant, Fox West Coast Theatres Corporation, a corporation; said answer, also, specifically denied that the Fox West Coast Agency Corporation, a corporation, at any time maintained or operated any seat in said theatre, and as a special defense alleged that the plaintiff was guilty of contributory negligence and assumption of risk. [Tr. pp. 6-11.]

The District Court, after trial before the court, entered judgment in favor of the appellee and against appellant, Fox West Coast Agency Corporation, a corporation. Judgment was entered in favor of the defendant, Fox West Coast Agency Corporation, a corporation, upon the ground that the District Court did not obtain or have jurisdiction over said defendant or of the subject of the action in so far as said defendant is concerned. [Tr. p. 146.]

Findings of fact and conclusions of law were signed, and judgment entered on the 12th day of March, 1942.

Within the time allowed by law the appellant, Fox West Coast Agency Corporation, a corporation, filed a motion for a new trial. Said motion for a new trial was orally presented and argued on the 20th day of April, 1942, and notice of ruling on said motion for a new trial, denying the same, was served upon the appellant, Fox West Coast Agency Corporation, a corporation, on the 28th day of April, 1942.

The appellant filed a notice of appeal on May 20, 1942. [Tr. pp. 147-149.]

Appellant's notice of appeal was filed on May 20, 1942. [Tr. pp. 148-149.]

The transcript of record on appeal, duly certified, consists of a statement of the case pursuant to Rule 76 of the Rules of Civil Procedure. This is a case wherein the questions presented by an appeal to a Circuit Court of Appeals can be determined without an examination of all of the pleadings, evidence, and proceedings in the court below; and the parties have prepared and signed a statement of the case showing how the questions arose and were decided in the District Court, and set forth only so

many of the facts averred and proved, or sought to be proved, as are essential to a decision of the questions by the Appellate Court. The statement has been approved by the Honorable District Judge, and has been certified to this Honorable Court as the record on appeal. [Tr. p. 153.]

The transcript of record, also, contains a copy of a superseadeas bond, certificate of the clerk of the District Court, certificate of the clerk of the United States Circuit Court of Appeals, and statement of points on which the appellant intends to rely upon the appeal. [Tr. pp. 153-161.]

The jurisdiction of the District Court of Civil suits at common law involving claims for damages by reason of bodily injuries arises from Article III, Sections 1 and 2, of the United States Constitution, which provides that the judicial power of the United States shall be vested in the Supreme Court and in such inferior courts as Congress may establish, and that such power shall extend to all cases in law between citizens of different states.

Jurisdiction of civil suits at common law for damages was vested in the District Courts of the United States by the Act of Congress of March 3, 1911, Chapter 231, Section 24, Par. 1, 36 Stat. 1091; May 14, 1934, Chapter 283, Section 1, 48 Stat. 775; August 21, 1937, Chapter 725, Section 1, 50 Stat. 738; April 20, 1940, Chapter 117, 54 Stat. 143; 28 U. S. C. A., Section 41.

Removal of suits from said courts to the United States District Court is authorized by the following Acts of Congress: March 30, 1875, Chapter 137, Section 2, 18 Stat. 470; March 3, 1887, Chapter 373, Section 1, 24 Stat. 552; August 13, 1888, Chapter 866, 25 Stat. 433;

April 5, 1910, Chapter 143, Section 1, 36 Stat. 291; March 3, 1911, Chapter 231, Section 28, 36 Stat. 1094; January 20, 1914, Chapter 11, 38 Stat. 378; 28 U. S. C. A., Section 71.

Appeals from final judgment entered in the United States District Court in cases of this kind are authorized by Section 225 of the Judicial Code, as amended May 20, 1926, Chapter 347, Section 13(A), 44 Stat. 587, 28 U. S. C. A., Section 225, providing that the Circuit Court of Appeals shall have appellate jurisdiction to a review by appeal final decisions in the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of Title 28. This is not a case where a direct review of the decision may be had in the Supreme Court.

Statement of the Case.

On March 24, 1940, a certain motion picture theater, known as United Artists Theater, was being conducted as a business in the City of Los Angeles, State of California. At said time the Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, were doing business under the name "Fox U. A. Venture." All of the persons employed in and about the actual operation of the United Artists Theater, where the appellee sustained her bodily injuries, were servants of said Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation. All money collected from members of the public who entered said theater belonged to said Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation.

The evidence fails to disclose that any employee of the appellant, Fox West Coast Agency Corporation, a corporation, had anything whatever to do with the control or maintenance of the seat in the theater, which collapsed when the plaintiff sat in it, or that any employee of the appellant had anything whatever to do with the inspection of said seat, or had anything to do with the repair of the same in the event it was defective. All of the work of inspecting, repairing and maintaining said seat was done by servants of the Fox-U. A. Venture.

The appellant, Fox West Coast Agency Corporation, a corporation, as *agent,* made the arrangements pursuant to which the persons actually in charge of the said theater were placed on the payroll of the said Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, doing business under the firm name and style of "Fox U. A. Venture."

The questions involved and the manner in which they are raised are as follows:

1. Whether the evidence is sufficient to show the existence of any contractual relationship between the appellant and the appellee.

2. Whether the evidence is sufficient to support a finding that the appellant was guilty of actionable negligence.

3. Whether the trial court committed prejudicial error in admitting in evidence a complaint in a prior action commenced in the Superior Court of the State of California by the appellee and the answer to said complaint filed by the appellant, Fox West Coast Agency Corporation, a corporation.

4. Whether the trial court committed prejudicial error in admitting in evidence a certain written contract between the appellant and Fox West Coast Theatres Corporation, a corporation, United Artists Theatre Circuit, Inc., a corporation, and other corporations.

5. Whether the trial court erred in receiving evidence of conversations between one of appellant's officers and the conclusions of said officer as a witness with reference to whether or not the appellant was engaged in the theatre business as of the date of the accident.

The manner in which these points are raised is by a statement of the case pursuant to Rule 76 of the Rules of Civil Procedure.

Specification of Errors.

1. The trial court erred in admitting in evidence the complaint in a prior action, filed in the Superior Court of the State of California in and for the County of Los Angeles by plaintiff and the answer of the appellant, defendant therein, to said complaint.

The grounds of objection urged at the trial are as follows:

> "On June 4th, 1940, the plaintiff commenced a prior action in the Superior Court of the State of California, in and for the County of Los Angeles, numbered amongst the files of said court 452891 and named as defendants the following: 'Fox West Coast Agency Corporation, a corporation, John Doe Company, a corporation, Richard Roe, Ltd., a corporation, John Doe and Jane Doe, Only the defendant Fox West Coast Agency Corporation, a corporation, was served with summons and complaint in said action number 452891. Said defendant Fox West Coast Agency Corporation, a corporation, filed

an answer to said complaint in the said Superior Court of the State of California, in and for the County of Los Angeles, on or about June 28th, 1940."

A copy of said complaint in Superior Court action No. 452891 was received by the trial court in the case at bar, in evidence as Plaintiff's Exhibit No. 6 and a copy of the answer of the defendant Fox West Coast Agency Corporation, a corporation, in said action bearing Superior Court No. 452891, was received by the trial court in the case at bar in evidence as Plaintiff's Exhibit No. 7.

Each exhibit was received over the objections of the defendant Fox West Coast Agency Corporation, a corporation, and the proceedings showing what occurred at the time the said complaint and answer were offered and received in evidence are as follows:

"Mr. Rountree: At this time, if the Court please, we will offer the complaint and answer which have heretofore been referred to, and portions thereof introduced by the defendants, in that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Jean L. Forsythe, plaintiff, vs. Fox West Coast Agency Corporation, *et al.*, and bearing No. 452891.

Mr. Gallagher: To that offer the defendants desire to make general objections and specific objections. The general objections are:

First: That the offered evidence is not competent for proof of any fact or issue raised by the pleadings in the case now being tried.

Second: Said offered evidence is not material for proof of any fact or material to any issue of fact raised by the pleadings in the action now being tried.

Third: Upon the ground that the offered evidence, to wit, the complaint and the answer in the action numbered 452891, are not relevant to any issue made by the pleadings in the case at bar.

Specifically and severally, I object to the offer of the plaintiff's complaint in said action upon the following grounds:

First: The document is a self-serving declaration of the plaintiff and is not competent for proof of any of the issues of fact raised in the pleadings in the case at bar with reference to any alleged tort liability. In other words, the defendants object to this complaint, in addition to the foregoing grounds, upon the ground that the allegations of the complaint are not competent proof of the existence of any relationship whatever as between the plaintiff and either of the defendants, or the existence of any duty between plaintiff and either of the defendants, or the breach of any assumed duty which may have existed on the part of the defendants, or either of them, towards the plaintiff, or with reference to any proximate causal connection between any alleged negligence and any injury sustained by the plaintiff, or with reference to proof of any damage sustained by the plaintiff as a proximate result of any actionable negligence, on the part of the defendants, or either of them.

Now, I desire to make a specific objection to each paragraph of the complaint as offered.

The defendants, and each of them, object to the offer of Paragraph I of the complaint upon each and all of the grounds heretofore specified, and upon the general ground that said paragraph is evidence which is incompetent, and upon the several and distinct grounds not stated in the conjunctive that it is also immaterial and is also irrelevant.

The defendants, and each of them, object to the allegations, and each and every element thereof, contained in the allegations of Paragraph II, upon each and every ground stated hereinbefore, such statement of each ground to be considered as a several and distinct objection made upon each of said grounds.

With reference to the allegations in the third paragraph, the same objections and each thereof are repeated.

With reference to the fourth paragraph, the same objections and each thereof, are repeated, and by repetition I mean to re-urge the same and each thereof to the allegations of both Paragraphs III and IV.

With reference to the allegations of Paragraph V, the same objections and each thereof are repeated and re-urged with reference to the allegations and each and every separate or distinct element contained therein.

With reference to the allegations in Paragraph VI, the defendants, and each of them, repeat and re-urge each and every objection heretofore made with reference to this offered evidence.

With reference to Paragraph VII of the complaint, the defendants, and each of them, repeat and re-urge each and every objection heretofore mentioned upon the same grounds severally as have been urged to the foregoing paragraphs.

With reference to the prayer of the complaint, the defendants, and each of them, make the same objections, and each thereof, and re-urge the same, and each thereof.

With reference to the verification to the complaint, the defendants repeat and re-urge each of the ob-

jections as hereinbefore specified to the offer of the complaint, or any specific paragraph thereof.

The defendants, and each of them, object to the offer of the answer of Fox West Coast Agency Corporation upon the following grounds:

First: The answer is not substantive proof of any fact or circumstance in issue in the case now being tried before this honorable court.

Second: The answer is not competent evidence of any fact.

Third: The answer is not material.

Fourth: The answer is not relevant.

I also specifically urge, as additional grounds of objection to the introduction of these pleadings, the proposition that pleadings in a prior action, or in the action now being tried by Your Honor, are not to be received as evidence of any of the matters therein contained. By that I mean as substantive evidence of any such matters.

Now, so far as the defendant Fox West Coast Theatres Corporation is concerned, it makes and reserves a separate and distinct objection from those in which it has joined with its co-defendant, Fox West Coast Agency Corporation, for the reason that these pleadings were not, and none of them was ever at any time served upon the Fox West Coast Theatres Corporation, and the Fox West Coast Theatres Corporation filed no pleading whatever in said action, and no matter stated in the answer of Fox West Coast Agency Corporation and no matter omitted from the answer of the Fox West Coast Agency Corporation in that action, is, in the slightest degree, binding upon the Fox West Coast Theatres Corporation.

Now, with specific reference to the allegations in the answer, the defendants, and each of them, object to

the introduction of the allegations contained in Paragraph I upon each and every ground which has been specified hereinabove in the objections to the offer of the complaint, and the same objections are made, and each thereof is made, to the offer of the allegations of Paragraph II of the answer.

The same objections, and each thereof, are made and re-urged to the offer of the allegations of Paragraph III of the answer.

The same objections, and each thereof, are made and re-urged to the offer of the allegations contained under the heading of 'As and for a first separate and special defense.'

The same objections, and each thereof, are made to the offer of the allegations, contained in the paragraph headed 'As and for a second separate and special defense', set forth in said answer:

The same objections, and each thereof, are re-urged to the prayer of said answer, and the same objections, and each thereof, are repeated and re-urged to the verification of said answer.

The Court: I will hear you.

(Argument of counsel.)

The Court: Objections overruled.

Mr. Gallagher: Might I ask, Your Honor, for the record, whether the Court is admitting evidence for all purposes with reference to each and every issue of fact raised by the pleadings, or whether the Court is admitting this complaint and answer for some specific purpose?

The Court: I am admitting them, as I will state again, so that the record will be clear, and so that counsel will be protected if there is any error in the ruling—I am admitting them the same as if the plaintiff in this action had written a letter containing these

statements to the defendant, or the same parties, or the defendant represented by Mr. Bertero in the present action, and if that defendant had written a letter to the plaintiff making the denial and admissions; the same as if it were in the form of correspondence. I don't know that I can make it any clearer.

Mr. Gallagher: Well, then, I assume, from what Your Honor has said, that the Court is admitting this evidence for the sole and exclusive purpose of a declaration against interest, or an admission on the part of the Fox West Coast Theatres Corporation, and not for any purpose other than that, and I ask the Court to so limit the effect of the evidence without waiving the objections, or any of them, that have been made.

The Court: That is correct. Proceed." [Tr. pp. 52-59.]

The substance of the evidence admitted is as follows:

"In the Superior Court of the State of California, in and for the County of Los Angeles.

Jean L. Forsythe, Plaintiff vs. Fox West Coast Agency Corporation, a corporation, John Doe Company, a corporation, Richard Roe, Ltd. a corporation, John Doe and Jane Doe, Defendants.

COMPLAINT FOR DAMAGES FOR PERSONAL INJURIES.

Comes now the plaintiff and for cause of action against the above named defendants, and each of them, alleges:

I.

That during all the times herein mentioned the Fox West Coast Agency Corporation, has been and now is a corporation duly organized and existing un-

der and by virtue of the laws of the State of Delaware, duly licensed to do business in the State of California, with its principal place of business in the County of Los Angeles, State of California.

II.

That the defendants John Doe Company, a corporation; Richard Roe, Ltd., a corporation, John Doe and Jane Doe are sued herein under fictitious names as their true names are unknown to plaintiff herein, and plaintiff asks permission upon ascertaining the true names of said defendants to insert their true names in lieu of said fictitious names.

III.

That during all the times herein mentioned, the defendants, John Doe Company and Richard Roe, Ltd. have been and now are corporations organized and existing under the laws of the State of California, with their principal place of business in the County of Los Angeles, State of California.

IV.

That the defendants, and each of them, operate and maintain a motion picture theater known as the United Artists Theater open for the general public to view motion pictures, said theater being located in the City of Los Angeles, County of Los Angeles, State of California.

V.

That plaintiff on or about the 24th day of March, 1940, paid an admission to the aforesaid theater located on South Broadway in the City of Los Angeles, County of Los Angeles, State of California, to view a motion picture offered by said defendants to the general public; that plaintiff was shown to a seat in said theater by an attendant and/or employee of the defendants herein; that due to the care-

lessness and negligence of the defendants, and each of them, and their employees, plaintiff upon sitting on said seat was violently precipitated to the floor of said theater, by reason of the broken condition of said seat and the collapsing thereof, all of which caused her great pain and severe shock to her nervous system, bruises, abrasions and contusions, and a severe strain and wrenching of her lower back, all of which was the direct and proximate result of the carelessness and negligence of the defendant aforesaid; that plaintiff is informed and believes that the above named injuries are permanent, all to her damage in the sum of Twenty Thousand Dollars ($20,000.00).

VI.

That as a result of the injuries sustained by the plaintiff, as aforesaid, plaintiff was forced to incur doctors and physicians services in the reasonable sum of $217.50; nurses hire in the sum of $187.51; hospitalization and ambulance hire in the sum of $165.97, medicines, medical supplies and supports in the sum of $112.95, all to her damage in the sum of $683.93.

That plaintiff will be forced to incur further expenses for treatment of said injuries and will ask leave of court to amend this complaint to include said further expenses incurred.

VII.

That plaintiff at the time of said injury was employed and receiving compensation in the sum of $135.00 per month, and that by reason of the injuries aforesaid, plaintiff was compelled to and did remain away from her work for a period of two months,

all to her damage in the sum of $270.00. That plaintiff is still unable to work at this time and for an indefinite time in the future, and will ask leave of this court to amend this complaint to include her damage for loss of wages.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of Twenty Thousand Dollars ($20,000) general damages; for the sum of Nine Hundred Fifty-three and 93/100 Dollars ($953.93) special damages, and for a further sum as special damages to be ascertained at the time of trial, together with her costs of suit herein incurred, and for such other and further relief as to this court may seem meet and just.

ROSECRANS & EMME
By OTTO J. EMME
Attorney for Plaintiff.

State of California, County of Los Angeles—ss.

Jean L. Forsythe being by me first duly sworn, deposes and says: that she is the Plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof; and that the same is true of his (her) own knowledge, except as to the matters which are therein stated upon his (her) information or belief, and as to those matters that he believes it to be true.

JEAN FORSYTHE.

Subscribed and sworn to before me this ..... day of May, 1940.

.....
Notary Public in and for the County of Los Angeles, State of California.

PLAINTIFF'S EXHIBIT No. 7.

In the Superior Court of the State of California in and for the County of Los Angeles.

Jean L. Forsythe, Plaintiff vs. Fox West Coast Agency Corporation, a corporation, *et al.*, Defendants. No. 452-891.

ANSWER.

Comes now the defendant Fox West Coast Agency Corporation, a corporation, and answers plaintiff's complaint as follows:

I.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraphs II, III, VI and VII of said complaint and placing its denial thereof upon said ground, denies said allegations and each thereof.

II.

Defendant denies each and every allegation contained in paragraph V of said complaint from and including the word 'that', line 20, page 2 to and including the figures '($20,000.00)', line 32, page 2 of said complaint.

III.

Defendant denies that plaintiff has been damaged in the sum of $20,953.93 or in any other sum whatsoever or at all.

As and for a First, Separate and Special Defense, defendant alleges that on or about the 24th day of March, 1940, the plaintiff so negligently, carelessly and recklessly conducted herself while in the United Artists Theatre in the City of Los Angeles, California, immediately prior to and at the time she seated herself in a certain seat in said theatre, that any in-

jury or damage sustained by plaintiff was a proximate result of said negligence, carelessness and recklessness on her part.

As and for a Second, Separate and Special Defense, defendant is informed and believes and therefore alleges that the plaintiff, at all times mentioned in her complaint, was an excessively obese person and that the said plaintiff was fully aware of the fact that her weight exceeded by a very great number of pounds the weight of the average person and the said plaintiff, at all times knew or should have known that seats in theatres and places of public accommodation are designed for the purpose of accommodating persons of normal size and normal and near normal weight and the plaintiff knew, at all times, that no seat in any theatre was designed for the purpose of accommodating a person of the grossly excessive weight and size as the plaintiff and with knowledge of all of the said facts, the plaintiff failed to use a certain seat in defendant's theatre in a manner commensurate with her excessive weight and excessive size and by reason thereof the plaintiff tore said seat apart and broke the same and the said plaintiff assumed any and all risk of injury which might ensue by reason of her failure to make proper allowance for the fact that she was using a seat which was not and could not have been designed for the accommodation of a person of the size and weight of the plaintiff.

Wherefore, defendant prays that plaintiff take nothing by her said complaint and that defendant have judgment for its costs incurred and to be incurred herein.

LASHER B. GALLAGHER

Attorney for defendant Fox West Coast Agency Corporation, a corporation.

State of California, County of Los Angeles—ss.

John B. Bertero, being by me first duly sworn, deposes and says: that he is the Assistant Secretary of Fox West Coast Agency Corporation, a corporation, one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JOHN B. BERTERO.

Subscribed and sworn to before me this 28th day of June, 1940.

ANN FRIEDLUND

Notary Public in and for the County of Los Angeles, State of California."

2. The trial court erred in the admission of evidence consisting of conversations between one of the appellant's witnesses and an officer of the appellant. One of the plaintiff's attorneys, Bayard R. Rountree, on or about the 11th or 12th day of June, 1941, testified with reference to certain conversations offered for the purpose of proving that the Fox West Coast Agency Corporation, a corporation, was actually operating the United Artists Theater in Los Angeles on March 24, 1940.

The questions asked for the purpose of eliciting the conversations were objected to as follows:

"Mr. Gallagher: That is objected to on two grounds. First, it calls for hearsay, and second, it calls for a conclusion of the witness based on hearsay, and it would not be competent for any fact in this case. The mere fact that a man is secretary of a corporation does not clothe him with the right to make

declarations with reference to past events, or have any conversation which would have the effect of establishing substantive proof of the existence of past events or past conditions." [Tr. p. 60.]

"Mr. Gallagher: I move to strike out the answer of the witness on the ground, that in effect, it is stating hearsay, and there is no evidence proving or tending to prove that Mr. Bertero had any authority whatever to speak for or on behalf of either defendant in this case with reference to any fact in issue in the case now being tried. The evidence must prove that whatever statement was made was made in the course and scope of some actual authority. The mere fact that a man is secretary of a corporation does not give him the right to go out, or even in his office, and have conversations with somebody with reference to some past event.

Q. By the Court: As I understand it, this is the same individual who signed and verified the answers to the complaints in this action? A. That is right.

The Court: Do I understand that counsel repudiates his authority to verify those answers, and that the verifications are false oaths of the secretary? Is that my understanding?

Mr. Gallagher: No, no, Your Honor.

The Court: I understood you to say he could not speak for the corporation. If he could not speak for the corporation, then he has made false oaths in verifying these answers.

Mr. Gallagher: Not at all.

The Court: Or he can only speak when it is in the interest of the corporation but he must be silent when anything comes out of his mouth that is unfavorable to the corporation; is that correct?

Mr. Gallagher: No; that is not what I contend at all.

The Court: All right. Let us have it.

Mr. Gallagher: What I contend is there is no evidence proving or tending to prove that Mr. Bertero was authorized to speak to Mr. Rountree with reference to any answer which may have been filed or which was going to be filed in any lawsuit. Furthermore, there is no evidence proving or tending to prove that Mr. Bertero was authorized by either corporation to have any conversation with Mr. Rountree about what had happened at the theatre on March 24, 1940, or at any other time, or at all, and I submit that that has nothing to do with his verification of their answer.

The Court: In other words, your position is that an officer of the corporation can verify an answer, but he cannot be inquired of with reference to his verification of the particular answer in that particular action. Now, he was either authorized to verify the answer or he was not.

Mr. Gallagher: Certainly, he was authorized to verify the answer.

The Court: But you cannot inquire of that man who verified the facts in that answer as to anything about the facts in the answer or connected with that transaction?

Mr. Gallagher: Yes. He is not here as a witness, you understand.

Direct Examination (Resumed).

Mr. Emme: Will you read the last question and answer, please.

(Last question and answer read by the reporter, together with motion to strike.)

The Court: The motion is overruled.

Q. By Mr. Emme: By referring to the case in the Superior Court, you were referring to the case pending in the Superior Court, No. 459395, and case No. 452891, in the Superior Court of Los Angeles County? A. That is correct.

Mr. Gallagher: If Your Honor please, for the purpose of avoiding the renewal of objections which were made with reference to the testimony of this witness in regard to conversations with Mr. Bertero, I wonder if counsel is willing to stipulate, if it is satisfactory to Your Honor, that all of this line of testimony having to do with conversations with Mr. Bertero shall be deemed to have been objected to upon each and every ground stated during the testimony of Mr. Rountree with the same force and effect as though restated verbatim?

Mr. Emme: Yes.

The Court: It will be so understood." [Tr. pp. 61-64.]

Upon the same subject matter, objections made to the questions asked of Mr. Bertero by plaintiff's counsel are as follows:

"Q. By Mr. Emme: Will you state the conversation you had with Mr. Rountree in the early part of June, 1941?

Mr. Gallagher: Objected to on the ground it is immaterial and not competent as proof in this case, no foundation laid, no showing of the authority of the witness at that time to have any conversation with Mr. Rountree with reference to any past event or with reference to any condition which may have existed in the past.

The Court: I think you better lay the foundation in the face of an objection of that kind. The witness has testified as to his authority and position at this

time, but there is no evidence as to his authority or position in 1941.

Mr. Gallagher: I will stipulate that he was assistant secretary of the corporation at the time the conversation occurred. The objection is based on this proposition: That there is no proof that Mr. Rountree and Mr. Bertero were discussing any business transaction in which the Fox West Coast Agency was interested, or that they were discussing any matter within the scope of Mr. Bertero's authority as assistant secretary of the corporation.

The Court: Of course, I cannot pass on that until I know what he is going to say.

Mr. Gallagher: And it is an attempt to vary the terms and provisions of a written instrument, to wit, Plaintiff's Exhibit No. 5, which is plaintiff's evidence produced here." [Tr. pp. 70-71.]

The substance of the evidence admitted relates to the legal effect of the answer which was filed by Fox West Coast Agency Corporation, a corporation, in the prior action commenced by plaintiff in the Superior Court of the State of California, in which action the answer failed to make any mention of the allegation contained in the complaint "that the defendants, and each of them, operate and maintain a motion picture theater known as the United Artists Theater, open to the general public to view motion pictures; said theater being located in the City of Los Angeles, County of Los Angeles, State of California," and the legal effect of the contract introduced in evidence in the case at bar as Plaintiff's Exhibit No. 5; and also, Mr. Bertero's opinions and conclusions with reference to whether the Fox West Coast Agency Corporation, a corporation, was operating the theater in the sense that appellee was a business invitee of the appellant. The evidence

referred to is in the Transcript of Record on the following pages: 64 to 77.

3. The finding of fact that the defendant, Fox West Coast Agency Corporation, a corporation, at all times mentioned in plaintiff's amended complaint was engaged in the business of operating and maintaining a motion picture theater known as the United Artists Theater is erroneous, because the evidence shows without conflict that the Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, doing business under the name "Fox U. A. Venture," were operating and maintaining said theater, and that the appellant, Fox West Coast Agency Corporation, a corporation, was merely an agent of the other corporations, and that no servant, agent, or employee of the appellant, Fox West Coast Agency Corporation, a corporation, had any connection whatever with the business, excepting to employ, on behalf of the corporation which actually operated and maintained the United Artists Theater, such persons as were physically in possession of the said theater and who actually operated and maintained the same.

4. The finding that the plaintiff paid an admission to the appellant is erroneous for the reason that the evidence shows without the slightest conflict that the money which the plaintiff paid for her ticket belonged to the corporations doing business under the name of Fox U. A. Venture.

5. The finding of the court that the appellant was careless and negligent in that employees of the appellant carelessly and negligently maintained and operated the seats in the United Artists Theater is erroneous, for the reason that there is no evidence whatever in the record showing that any servant or employee of the appellant had anything

whatever to do with the maintenance or operation of any seat in the theater, all of the evidence showing that each and every person in said theater was an employee of the corporations doing business as Fox U. A. Venture.

6. The conclusion of law that plaintiff should have and recover judgment in the sum of twenty-five hundred ($2500.00) dollars against the Fox West Coast Agency Corporation, a corporation, is erroneous, for the reason that in legal effect the trial court found that the plaintiff failed to inspect or pay any attention to the seat or the condition thereof, and that she failed to discover whether the same was or was not in a safe condition, and failed to ascertain or discover whether the same was or was not loose, and failed to make any test whatever of said seat; and permitted her body to come in severe and unusual contact with the parts of said seat; and caused the said seat to be subjected to an extraordinary or unusual strain or stress; and forced a portion of her body between the arms of said seat in a manner in which the said seat was not designed to be used and caused an extraordinary or unusual strain and stress on the arms of said seat, to the sides thereof, and away from each side of the plaintiff's body; and used the arms of said seat for a purpose for which they were not designed; and failed to take into consideration the fact that the seat was designed to accommodate persons of average bulk and weight; and forced her body into said seat.

7. The findings against the defense of contributory negligence are erroneous for the reason that the evidence shows that the plaintiff subjected the metal parts of the seat to unusual and extraordinary strain and stress, and negligently failed to make any tests whatever of the seat, and negligently failed to exercise ordinary care.

ARGUMENT OF THE CASE.

I.

There Is No Evidence Showing That There Was Any Relationship Between the Appellee and the Appellant, Except That They Were Strangers to Each Other and Occupied That Relationship Which One Member of the Public Bears to Another Member of the Public; and the Evidence Fails to Show That the Appellant Violated or Breached Any Duty Which It Owed to the Appellee.

The argument now presented relates specifically to the third, fourth, and fifth specifications of error hereinabove set forth. Said specifications relate to the same general subject matter consisting of the claim of the appellant that there is no evidence showing the existence of any duty owed by the appellant to the appellee, or the breach of any duty owed by the appellant to the appellee.

The only evidence offered by the plaintiff with reference to the alleged connection of the appellant with the business of operating the United Artists Theater (aside from the conversations between the witness, Rountree, and John B. Bertero, and the conclusions and opinions of John B. Bertero, which will be presented in a subsequent point in this brief) is a written contract. The document is too lengthy to quote in full as a part of the brief because of the fact that the appellant is restricted to an 80-page brief, and, therefore, the contract, Plaintiff's Exhibit No. 5, is set forth in the appendix hereto attached. This contract is printed in full in the transcript of record [pp. 18-38 incl.]. The substance of the contract, in so far as it relates to the appellant, Fox West Coast Agency Corporation, a corporation, is that the corporations doing busi-

ness as Fox U. A. Venture, surrender to and vest in appellant the management of four separate theaters, and that appellant

> "shall manage and operate the theater for the joint benefit of the parties hereto, and as such manager or operator shall have, among other things, the sole right and authority, and obligation as *agent* for the other parties hereto, (a) To select, purchase, license, lease and/or book motion pictures to be exhibited in the theatres; (b) to employ the personnel which in the opinion of Agency may be necessary for the successful operation of the theatres, including a local manager for each of the theatres, and one district manager, for all of the theatres; . . ." [Tr. p. 21.]

For its services as such manager, the appellant was to receive 5¼% of the gross income of the four theaters. [Tr. pp. 22-23.]

The gross income of the theaters was to be held in trust for the benefit of the corporations owning the theaters. [Tr. p. 23.] Appellant had absolutely no interest in the net profits of the business. [Tr. p. 27.]

> "This agreement is made solely for the benefit of the parties hereto and shall not be construed to render Agency (appellant) liable to any person, firm or corporation other than the parties hereto, . . ." [Tr. p. 38.]

> "Nothing herein is intended or shall be construed so as to create a partnership between or among the parties hereto, or to make any of the parties hereto a partner of any other or all of the remaining parties hereto." [Tr. pp. 36-37.]

The testimony of the witnesses with reference to the operation of the United Artists Theater and the maintenance of the equipment contained therein is as follows:

John B. Bertero, called as a witness on behalf of appellee, testified, in part, as follows:

In my capacity as assistant secretary of Fox West Coast Theatres Corporation, a corporation, I have knowledge of a certain entity referred to as Fox U. A. Venture. All of the money taken in from the sale of tickets, the income from the conduct of the business of the United Artists Theater at 933 South Broadway went into a bank account kept separate and apart from any bank account of the Fox West Coast Agency Corporation, a corporation.

The payroll records of all of the persons from the manager of the theater down to the lowest employee in scale in that theater during the month of March, 1940, were kept in the name of Fox U. A. Venture, a bookkeeping title set up to economically describe the arrangement so far as accounting and other methods were concerned under Plaintiff's Exhibit No. 5. The name, "Fox U. A. Venture", refers only to United Artists Theatre Circuit, Inc., a corporation, and Fox West Coast Theatres Corporation, a corporation.

After the 5.25% of the gross income of the United Artists Theater at 933 South Broadway was deducted and the payment of salaries of employees in that theater, including the manager of that theater, were deducted, the balance of that money went into a separate bank account and ultimately what we call "distributions of the Venture" were distributed to the two parties to the Venture; that is, the Fox West Coast Theatres Corporation, a corporation, and the United Artists Theatre Circuit, Inc., a corporation.

I obtained from the original records kept by the Fox U. A. Venture the payroll showing employees at the United Artists Theater at 933 South Broadway for the entire month of March, 1940. [Tr. pp. 71-79.]

> "It is stipulated by and between the parties that it would be impracticable to attempt to make a copy of the payroll sheets and employer's report of taxable wages paid, received in evidence as Defendants' Exhibits C and D, because of the fact that a typewriter cannot duplicate the exact form of contents of said exhibits in the manner in which the contents of said exhibits are set forth therein and also that it would be impracticable to attempt to print the exhibits on the size paper used by printers in the printing of the record on appeal and it is therefore stipulated that the originals of the Defendants' Exhibits C and D be sent to the appellate court in lieu of copies and that the above entitled court may make such order therefor and for the safe keeping, transportation, and return thereof, as it deems proper, and that in preparing briefs in the Circuit Court of Appeals the parties may print in their briefs a narrative of the contents of said exhibits which they or either of them desire to call to the attention of the Circuit Court of Appeals.
>
> "It is also stipulated that it is impossible to reproduce by means of a typewriter or printed words Defendants' Exhibits F, G, H and I, said latter exhibits being portions of broken iron, testified by defendants' witnesses to have been part of the seat occupied by the plaintiff in the theater." [Tr. pp. 90-91.]

Defendant's Exhibits C and D contain the names of each and every person who did any kind of work at the United Artists Theater, where the plaintiff sustained her

injuries. The documents consist of payroll records kept by the Fox U. A. Venture and employer's reports of wages of all employees as made to the State of California and the Treasury Department of the United States Government, showing wages paid for the month of March 1940. In the return made to the State of California and to the Treasury Department, Fox U. A. Venture is the entity shown as the employer. The payroll records show the Fox U. A. Venture as the employer. None of these records show the appellant as the employer of any of the individuals in the theater.

These documents are compiled in such form as to make it impossible to print them in the brief, and all that can be done is to state the substance and legal effect of the documents. The court of necessity will examine the original exhibits and such inspection will show that all of the persons who were actually in the theater were employees of the Fox U. A. Venture.

With the foregoing explanation with reference to documentary evidence, appellant will now proceed with the further testimony of Mr. Bertero.

The employer's report of the taxable wages paid to each employee for the quarter ending March 31, 1940, was taken from the records of Fox U. A. Venture, kept in the regular course of business, which shows the employer's report of taxable wages paid to each employee in the United Artists Theater, 933 South Broadway, as of March, 1940.

Fox U. A. Venture is not a corporation. Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, jointly are entitled to the proceeds from the operation of several

theaters, including the United Artists Downtown Theater. Books of account are kept for the two parties, and expenses are paid by the two parties out of a common fund, and they receive the residuum of whatever is left from the operation of those theaters. The handling fee, or whatever you may call it, of the Fox West Coast Agency Corporation in the sum of 5.25% is obtained from the same fund. All of the proceeds from the United Artists Theater are put into this fund. [Tr. pp. 84-86.]

Harry L. Wallace, one of the defendant's witnesses, testified in substance as follows: The payroll records were prepared by me and were typed from rough copies made by the witness at the theater. The records truly and correctly reflect the names of each and every person who performed any work of any kind in that theater. The names of the janitors are as they appear on the payroll record.

The seats would be pushed up by the janitors twice a day, and there had been an inspection of the equipment in general including the seats, in addition to that made by the janitors daily, between December 29, 1939 and March 24, 1940; that those who made the daily inspection were the witness and a Mr. Corley, who was the floorman, and certain girls designated to certain sections in the theater to inspect; that in addition to the inspections made by the witness, Mr. Corley and the janitors, the usherettes, also, made inspection, and that on and prior to March 24, 1940, before the appellee was injured, the witness had not noticed anything wrong with the seats in the row that the appellant was then occupying. On March 24, 1940, in the morning the house was completely full. The usherettes had filled every seat. There were no more vacant seats. Every seat in that theater was occupied from about 9:45 a. m. until 1:30 p. m. by persons who were viewing the picture.

Fox U. A. Venture paid my salary. That is the same entity that was referred to by Mr. Bertero when he was testifying here.

Mr. Wallace, also, testified with reference to the number of the seats in the downstairs portion of the theater, and that he personally inspected that portion of the house which included the seat involved in the accident which is the subject of this litigation and that the seat was all right in the morning when he inspected it. The inspection he made was that the seat appeared tight to him, and that if the seat had been broken the seat would not raise up and down.

The witness testified that when he inspected the seat after the accident, part of the metal portion of the seat had been ripped clear out of the seat portion itself, and that the metal portion had been broken. [Tr. pp. 105-122.]

Defendant's witness, Robert Arroyo, testified that on the 24th day of March, 1940, he was working at the United Artists Theater, 933 South Broadway, as a janitor, and that the same crew working there on said date had worked for a long time before and after that date; that the seats in the theater were cleaned every night; that in cleaning the seats he took hold of the seats; that after cleaning, the janitor had to raise every individual seat; that if he discovered any seat to be loose, the janitor had to report it to the manager or one of the men that fixes seats in the theater; that there are some of the men there that fix the seats. [Tr. pp. 123-124.]

James E. Corley, defendant's witness, testified that in the month of March, 1940, he was employed at the United Artists Theater, 933 South Broadway, Los Angeles, as

floor manager; that on said date he examined the second seat from the end in row 13, which was a seat that had been involved in an accident involving the appellant; that very shortly after he spoke to the appellant, he examined the seat and the pieces of broken metal, and that those pieces of metal are Defendant's Exhibits F, G, H, and I, and that except for changes that may have occurred along the fractured lines of the metal, the pieces were in the same condition at the time he testified as they were when he saw them in the theater; that he went down to the particular row of seats, and that the second seat in from the isle was empty at that time; that the left side of the seat was down, and as he put his hand on it, it would give just a fraction; that it did go up and down just a little bit, and that he could tell by putting his hand under it that it was broken; that is, the second seat from the isle; that there was no part of the seat other than the piece of metal which was broken or out of order, and that when he used the words "that metal", he referred to Defendant's Exhibits F, G, H, and I. [Tr. pp. 136-138.]

Vance Cudd, defendant's witness, testified as follows:

> "In the month of March, 1940, I was working as janitor at the United Artists Theater, 933 South Broadway, Los Angeles. I had been working there for three or four months and worked during the entire month of March, 1940. In doing my work as a janitor and with reference to the seats in the rows within the area being cleaned each day, we just came in direct contact with them to clean out between the seats and underneath the seats.
>
> "We raised the seats up with our hands and left them up for the next day. We raised the seats with our hands. In my work in the theater before March,

1940, I had had occasion to raise and lower every seat in the house. In the course of my work I became familiar with the seats, and from my experience in handling those seats I could tell by raising or lowering them whether the seat was broken or loose." [Tr. pp. 138-140.]

Gough L. Cheney, defendant's witness, testified as follows:

"I am a chemist and metallurgist, engaged in that occupation since 1910. I have had occasion to examine metal during that time and during my practice as a metallurgist. I have in my possession certain pieces of cast iron which I first saw about June 1940. I went to the United Artists Theater at 933 South Broadway since I obtained these pieces of cast iron and examined the general construction of the seats in that theater.

"From an examination of the fractured surface and the specimens, it is my opinion that the breaks or fractures occurred practically at the same moment; that is, instantaneously. I found no defect in the metal which could possibly be discovered by any kind of an examination, excepting disintegration of the entire fixture or fitting. The load was supported by these two surfaces, which fit into a corresponding groove in the frame of the seat, the load being carried by these two pieces with a bolt holding them in place."

The two parts just referred to by the witness are Defendant's Exhibits F and G; F being the larger portion and G being the smaller portion, and the portion of the casting at the farthest end from the hinge, the smaller

section, is the part that was referred to as the weight-bearing portion.

"From my examination of the seats in the theater and inspection of the mechanical construction and design of the seats, my opinion as to the cause of the fracture of the pieces marked F and G is that they were subjected to a load greater than the cross section of the metal could withstand. A piece of metal is subjected to a load both by lowering a weight into the seat and also by impact.

"A metal part which is apparently sound might break, even though the total weight which was involved was less than the total weight which that part would sustain, by sudden impact or a moving weight, which would give it more foot pounds of energy, or by reducing the bearing surface on the cantilever, such as would occur by a side thrust, which would push the bearing surfaces away, or which would allow them to move and thereby change the direction of the applied force.

"Assuming that a person whose hips were wider than the space between the insides of each arm would sit in such a seat, and assuming that such person would have to force his or her body into that space, any side thrust applied to the arms of the chair would have a direct action on the cantilever bearing of the seat bracket. It would throw stresses in there, and it would be hard to determine just what the ultimate effect would be, but the leverage action there would be rather great, as the design of that portion of the seat does not consider absorbing stresses in that direction.

"Speaking particularly with reference to the seats in the United Artists Theater downtown and their

conformity, so far as design and construction is concerned, they are of typical cantilever construction.

Defendant's Exhibits H and I, the large part being H and the small part being I, fitted together, are typical of the construction of the seat that was fractured. That particular piece of metal in my opinion was fractured. There is no possible indication of any defective metal. In my opinion that fracture occurred at the same time as the fracture of the other parts marked Defendant's Exhibits F and G.

"This portion that I have in my hand is a part of the support on the left side of one of those seats in that theater as the person sits in it and faces the screen.

"I have attempted to fit these two parts together, that is, Defendant's Exhibits F and G, and these which have been marked Defendant's Exhibits H and I. They fit together; they are parts of a unit.

"I think all of these fractures occurred at the same time, as close as anything could happen in sequence. Undoubtedly one particular part broke first, followed immediately by the other. It may have been a fraction of a second, but one did occur first. It is my opinion that the fracture on Exhibit F occurred first because Exhibit H acted only as a guide; did not necessarily carry any load itself. In other words, something undoubtedly twisted the seat out of position in order to break the guide.

"It is, in my opinion, that these fractures occurred in Defendant's Exhibits F and H not because a greater weight was placed on the seat than it was designed to bear, but that a greater load was placed on the metal than the particular bearing surface of this cantilever, Defendants' Exhibit F, was able to withstand." [Tr. pp. 125-135.]

There is no legal foundation for any decision or judgment in favor of the plaintiff and against the Fox West Coast Agency Corporation, a corporation.

The defendant Fox West Coast Agency Corporation, a corporation, cannot be a tort feasor. The only tort feasors known to the common law are natural persons. A corporation is never guilty of committing a negligent act but is responsible, if at all, by resort to the doctrine of *respondeat superior*.

The evidence in the case at bar is wholly barren of proof that any agent or servant of the Fox West Coast Agency Corporation, a corporation, negligently or otherwise maintained or operated any seat in the United Artists Downtown Theater in Los Angeles. To the contrary, the evidence demonstrates that the only natural persons who had anything to do with the maintenance or operation of any seats in the theater were the employees of the Fox U. A. Venture, a joint enterprise conducted by the Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation.

The plaintiff is not, in so far as the defendant Fox West Coast Agency Corporation, a corporation, is concerned, entitled to the application of the doctrine *res ipsa loquitur* for the reason that there is no evidence proving or tending to prove that the Fox West Coast Agency Corporation, a corporation, had or was entitled to the exclusive management or control of the seat which collapsed when appellee sat upon it.

In the case of *Parker v. Granger,* 4 Cal. (2d) 668, 52 Pac. (2d) 226, the California Supreme Court definitely holds that the doctrine of *res ipsa loquitur* is never applicable unless the evidence shows that the instrumentality

which caused the damage was in the exclusive possession of the defendant sought to be charged with responsibility at the very instant when the accident happened. The most that can be contended for by appellee in this case is that, if the evidence fails to show exclusive control of the instrumentality at the time of the happening of the accident, the proof *must* show that at the time of the commission of the negligent act or omission which proximately caused injury to plaintiff, the seat was in the exclusive control of the appellant Fox West Coast Agency Corporation, a corporation.

There is no proof in the record in this case that the Fox West Coast Agency Corporation, a corporation, at any time had or was entitled to the exclusive or any control of the seat involved in the accident.

It is the law of the State of California, and in all substantial common law jurisdictions, that whenever the proof shows the actual cause of an accident, the doctrine *res ipsa loquitur* is not applicable. *Res ipsa loquitur* is not a rule of liability but is merely a rule of evidence.

The testimony in the record shows, without contradiction, that the cause of the collapse of the seat was the breaking of a metal part; that the break was new and that it resulted from an application of force and that there was no defect in the metal.

The evidence also shows, without contradiction, that prior to the time the plaintiff entered the theater, the seat had been occupied by at least one other person for a period of approximately three hours. It cannot be inferred that the seat was in the broken condition at the time the plaintiff commenced to sit in it. If it had been broken prior to the time the plaintiff sat in it, no other patron of the

theater could have used the seat for the purpose of viewing the picture.

The manager of the theater testified that on the day of the accident and before any patrons entered the theater at all, he personally inspected a group of seats amongst which was the seat in question and that at the time of said inspection the seat was not loose and appeared, from physical contact, by taking hold of the seat and moving it up and down, to be tight and in good mechanical condition.

If there was any negligent inspection of this seat and if there was any condition about the seat which could have been ascertained by an ordinarily prudent inspection on the day of the accident, prior to the time the plaintiff entered the theater, the only natural person who was guilty of any negligent act was the manager of the theater. The evidence conclusively establishes, to the point of absolute demonstration, that the manager of said theater was an employee of the Fox U. A. Venture.

The substantive law of the State of California, applicable to the foregoing situation is contained in code sections.

Section 2338 of the Civil Code provides as follows:

> "Unless required by or under the authority of law to employ that partciular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and

for his willful omission to fulfill the obligations of the principal."

Section 2343 of the Civil Code provides as follows:

"One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

1. When, with his consent, credit is given to him personally in a transaction;

2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,

3. When his acts are wrongful in their nature."

Section 2351 of the Civil Code provides as follows:

"A subagent, lawfully appointed, represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the subagent."

The fact that the Fox West Coast Agency Corporation, a corporation, employed this manager for the Fox U. A. Venture, does not make the Fox West Coast Agency Corporation, a corporation, responsible to the plaintiff for the acts of the manager. The only corporation responsible for any actionable negligence on the part of the manager of the theater in failing to make a reasonably careful inspection, if he did so fail, would be the corporation which had employed him and whose servant he was.

What negligence is shown in the evidence to have been fastened upon any servant or employee or officer of the defendant Fox West Coast Agency Corporation, a corporation?

The learned trial judge evidently concluded from the written contract, Plaintiff's Exhibit No. 5, that the Fox West Coast Agency Corporation, a corporation, was a coproprietor of the theater and that it, with the corporations doing business under the name, Fox U. A. Venture, was engaged in a partnership.

It is elementary that two or more corporations cannot become partners. That is so for the reason that all of the affairs of a corporation are by statute subject to the control of the board of directors and officers of a corporation and the corporation cannot be bound by the acts or omissions of anyone excepting its duly authorized officers and board of directors. In the law governing partnerships, each partner is liable for the acts of the other in and about the conduct of the partnership business. In California partnerships cannot be organized excepting by natural persons. In addition to the foregoing observation, the contract itself provides that the Fox West Coast Agency Corporation, a corporation, is not a partner of any other party to the contract and that there is nothing in the contract intending to create any partnership. The contract also definitely provides that the Fox West Coast Agency Corporation, a corporation, is nothing but an agent.

The plaintiff is not a party to the contract, Plaintiff's Exhibit No. 5, and cannot predicate any part of her cause of action thereon.

Under the substantive law of the State of California, the Fox West Coast Agency Corporation, a corporation, cannot be held liable to the plaintiff.

In support of this point, the defendant Fox West Coast Agency Corporation, a corporation, in addition to referring to the code sections hereinabove set forth, cites the case of *Thurman v. The Ice Palace,* 36 Cal. App. (2d) 364, 97 Pac. (2d) 999. In that case the manager of the Associated Student Body of the University of Southern California was sued by the plaintiff on the theory that the Ice Palace and the Associated Student Body of the University of Southern California were conducting a business enterprise consisting of a hockey game for profit and that the plaintiff having paid an admission fee was an invitee of not only the Ice Palace and the Associated Student Body of the University of Southern California but also of the manager of said Associated Student Body of the University of Southern California. The trial court granted a motion for a directed verdict in favor of all of the defendants. The District Court of Appeal reversed the judgment entered upon the directed verdict in favor of the defendants Ice Palace and Associated Student Body of the University of Southern California *but affirmed the judgment as to all of the other defendants, including Arnold Eddy, the manager of the Associated Student Body of the University of Southern California.*

The court says:

> "With reference to the defendants who move to dismiss the appeal or affirm the judgment, there is a total lack of any evidence showing that they were in any way connected with the management or shared in the proceeds or had any interest in the venture. Therefore, the judgment should be affirmed as to them."

If a person receiving remuneration for acting as a manager for and on behalf of the actual proprietor of a business enterprise is not responsible for an injury sustained by an invitee, it is difficult to understand how the Fox West Coast Agency Corporation, a corporation, is subject to liability in the case at bar.

There is no doubt about the proposition that in the *Thurman* case, Arnold Eddy, the manager, received a salary from the Associated Student Body of the University of Southern California and that his remuneration depended in great part upon the business activities of said Associated Student Body. If the Associated Student Body collected no money it would have nothing with which to pay a salary to its manager. It is therefore apparent that the District Court of Appeal, in the *Thurman* case, did not use the language "the management or shared in the proceeds or had any interest in the venture," in any sense excepting with reference to proprietorship; otherwise, the court could not have affirmed the judgment in favor of Arnold Eddy. Arnold Eddy stood in the same relation to the Associated Student Body of the University of

Southern California as the Fox West Coast Agency Corporation, a corporation, stood in relation to the Fox U. A. Venture.

Counsel for the Fox West Coast Agency Corporation, a corporation, has made an exhaustive search of the authorities and being unable to find any such case, challenges counsel for the plaintiff to submit a single authority holding that the manager of a theater is personally responsible for injuries to a patron of the theater when the manager is not the proprietor of the theater.

All of the cases which have been read by defendant's counsel, the text books and encyclopediae, restrict their discussion to the liability of the *proprietor* of the theater or place of amusement. In 62 *Corpus Juris,* 863, the rule is stated as follows:

> "The *proprietor* of a place of public amusement is required to use ordinary or reasonable care to put and keep the premises, appliances, and amusement devices in a reasonably safe condition for persons attending: and if he fails to perform his duty in this regard, a patron who is injured in consequence thereof is entitled to recover for the injury sustained."

It is respectfully submitted that the record in this case fails to show the existence of any contractual relationship between the appellant and appellee, or any negligence whatever on the part of the appellant.

II.

The Trial Court Erred in Admitting in Evidence the Complaint and Answer in a Prior Action Filed by Plaintiff in the Superior Court of the State of California in and for the County of Los Angeles.

The grounds of objection made have heretofore been set forth under specification number I.

The particular purpose of appellee in offering the complaint and answer in the prior action was to show that on March 24, 1940, the appellant was operating and maintaining a motion picture theater known as the United Artists Theater, open for the general public to view motion pictures. When the appellant, Fox West Coast Agency Corporation, a corporation, answered the prior complaint, it omitted to say anything about the allegations of paragraph IV of said complaint. Said paragraph IV appears on page 93 of the transcript of record.

Aside from the contention of the appellant that pleadings in the prior action are not admissible as evidence, it is vigorously asserted that even though the complaint and answer in the prior action could, under any circumstances, be properly received in evidence for any purpose, the omission of the appellant to notice the allegations of paragraph 4 in said prior complaint is of no moment, for the reason that said paragraph does not allege that *any* of the defendants operated or maintained the United Artists Theater *as of the date of the accident,* to-wit: March 24, 1940. If it appeared that the Fox West Coast Agency Corporation, a corporation, was actually operating and maintaining the United Artists Theater as a business at the time the plaintiff filed her original action in the Su-

perior Court, such fact would not prove that at a prior time, to-wit: March 24, 1940, the same situation existed.

In view of the fact that the record shows the trial court attached the utmost importance to the evidence consisting of Plaintiff's Exhibits No. 6 and No. 7, the ruling admitting these pleadings was prejudicial error.

III.

The Trial Court Erred in the Admission of Evidence Consisting of Conversations Between One of the Appellant's Witnesses and an Officer of the Appellant, and Also in Receiving the Opinions and Conclusions of the Same Officer When He was Called as a Witness.

The argument now made is addressed to Specification of Error Number 2.

The mere fact that a person is an officer of a corporation does not make every utterance of such person an act of the corporation. The general rule is that the declarations of an officer of a corporation are not binding upon the corporation unless the declarations are made during the actual transaction of some business for and on behalf of the corporation. The declarations of an officer of a corporation in which such officer relates past events which may have occurred are not competent proof binding upon the corporation.

Section 1850 of the Code of Civil Procedure provides as follows:

> "Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction."

Subdivision 5 of section 1870 of the Code of Civil Procedure provides as follows:

> "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * *
>
> "5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, *within the scope of the* partnership or *agency,* and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party; * * *"

Subdivision 7 of section 1870 of the Code of Civil Procedure provides as follows:

> "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * *
>
> "7. The act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty; * * *"

The mere fact that a man has been an officer of a corporation for a period of one year does not mean that everything he says while sitting in his office is within the scope of his agency and during its existence. It is respectfully contended by the defendant, Fox West Coast Agency Corporation, a corporation, that the declaration of an agent, to be admissible in evidence as against the principal, must form part of a pending transaction between the principal and the person having the conversation with the agent.

The general rule with reference to declarations of agents is clearly set forth in Jones on Evidence, Civil Cases, Third Edition, sections 356 and 357, as follows:

> "Whatever an agent does in the lawful exercise of his authority is imputable to the principal and where the acts of the agent will bind the principal, his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time, and constituting part of the transaction and declarations of this character are often classed in the decisions as *res gestae*. Thus in an action for purchase money, the false representations of the vendor's agent made during the negotiations may be shown. The same is true in an action for refusing to accept merchandise sold; the declarations of the agent of the defendant as to the quality of the goods, while weighing and receiving of them, are competent. In an action against a railroad company for ejecting a passenger from the car, the language of the employee while in the performance of the act is admissible. Where a corporation, such as a railroad or an insurance company, invests an agent with general authority to adjust claims against it, his declarations made while endeavoring to secure an adjustment of the claim are competent evidence against the principal. An agent who has charge of the construction of a building may bind his employer by his admissions explaining payments relating thereto. Other illustrations of statements admissible against the principal are those of the agent at the time of the sale of personal property, or at the time of a fire, to the effect that it was caused by his negligence. But, generally speaking, an agent's declarations, made subsequently to the transaction in question, are inadmissible against the principal, because in such case, they are no part of the *res gestae*, but are mere hearsay.

"It is of course an indispensable requisite to the admission of the declarations of an agent as part of the *res gestae* that such agency or authority be first proved. Such agency cannot be proved by the declarations themselves, no matter how publicly made; nor by such declarations accompanied by acts purporting to be in behalf of the principal unless they are brought to his knowledge. It is also a requisite to the admission of such declarations that they be made during the continuance of the agency, and in regard to a transaction still pending. Thus, a conversation between agents or employees of a railroad company concerning a past transaction is clearly incompetent as evidence against the company; and the declarations of the president of a corporation relative to its ownership or as to its former dealings with other parties, which are not shown to have been made while in the performance of his duties as such officer or while doing business contemporaneously with the declarations, are not binding on the company.

"Declarations by Agents of Corporation.—This subject is frequently illustrated in the case of declarations of agents and employees of corporations and other defendants in actions for negligence. Thus, the declarations of an employee or officer as to who was responsible for an accident, or as to the manner in which it happened, when made at the time of the accident or soon after, have been held incompetent, as against the company, on the ground that his employment did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his duty; and that his declaration did not accompany the act from which the injuries arose and was not explanatory of anything in which he was then engaged, but that it was a mere narration of a past occurrence.

"However, as we have already pointed out, there is a class of cases in which the rule that the declaration must be contemporaneous with the act, is construed less strictly; and in which such declarations are admitted, although not technically contemporaneous, if they are spontaneous and tend to explain the transaction, and if so slight an interval of time has elapsed as to render premeditation improbable. Accordingly in numerous cases the declarations of employees and agents, made soon after an accident, have been received as part of the *res gestae*.

"The transaction may be of such a character as to extend through a considerable period of time; and in such cases the declarations of the agent in reference to the business, if within the scope of his authority, may be received, provided they are made before such transaction is completed. Thus, a letter or other statement of an officer of a corporation respecting a transaction which forms the subject of the controversy is admissible in an action against the corporation, if made while the transaction is in progress. The declarations of a baggage-master in answer to inquiries after lost baggage, and the statements of an insurance agent during a controversy about the renewal of insurance, to the effect that he delivered a certificate of renewal, are admissible on the same ground. Although most of the illustrations given above relate to the declarations of agents of corporations, it need hardly be added that the same general principles govern as in the case of the agents of individuals. To bind the principal, the declarations must be within the agent's authority and must accompany an act which he is authorized to do."

There was no transaction pending between the plaintiff and the Fox West Coast Agency Corporation, a corpora-

tion, at any of the times when Mr. Rountree was talking to Mr. Bertero. Mr. Rountree was endeavoring to ascertain the relationship, if any, of the Fox West Coast Agency Corporation, a corporation, to the maintenance and operation of the seats in the United Artists Downtown Theater as of the date of the accident. Mr. Rountree was merely acting as an agent of the plaintiff in making an investigation and it is quite obvious that the defendant corporation was not, through Mr. Bertero, or otherwise, engaging in any transaction with the plaintiff.

If there ever had been a transaction between the plaintiff and the Fox West Coast Agency Corporation, a corporation, such transaction terminated on the day of the accident. The accident was not a transaction and the litigation which ensued thereafter is not a transaction. At the time of the conversation referred to by Mr. Rountree, the record will show that the Fox West Coast Agency Corporation, a corporation, was represented by counsel of record in the litigation. There is no evidence showing that the Fox West Coast Agency Corporation, a corporation, authorized Mr. Bertero to have any conversation whatever with Mr. Rountree, especially in the absence of counsel for the Fox West Coast Agency Corporation, a corporation. The mere fact that Mr. Bertero talked to Mr. Rountree does not show that the Fox West Coast Agency Corporation, a corporation, authorized him to do so or had any knowledge of the fact that he was doing so.

In so far as the declarations of Mr. Bertero or his testimony in court tended to vary the provisions of the written contract between the Fox West Coast Agency Corporation, a corporation, and the proprietors of the United Artists Downtown Theater, such declarations and his testimony are and each thereof is not competent proof.

IV.

The Conclusion of Law That Plaintiff Should Have and Recover Judgment in the Sum of Twenty-five Hundred ($2500.00) Dollars Is Not Supported by the Findings of Fact With Reference to the Special Defenses of Contributory Negligence and Assumption of Risk; and the Findings That Appellee Was Not Negligent or Careless Are Not Supported by the Evidence.

The trial court in effect found that each and every act alleged by the defendant to have been committed by the plaintiff was done by her, and that she omitted the doing of everything, the omission of which was alleged in the answer.

The trial court merely found that the plaintiff did not negligently and carelessly do or omit the matters alleged.

In the case of *Mardesich v. C. J. Hendry Co.*, 51 A. C. A. 782 (not yet reported in bound volumes), a California District Court of Appeal reversed a judgment in favor of a plaintiff in a personal injury action because of the fact that the findings were made in the form of negatives pregnant. The court said with reference to similar findings:

> "Even if we could construe the words as being synonymous the finding would only deny the adjectives and would still imply that the acts specified were done; *i. e.*, that plaintiff failed to maintain his balance while going down the ladder; that he failed to place his feet firmly upon the rungs of the ladder;

> that he failed to maintain his weight in relation to the slant of the ladder so that the ladder would not slip or slide from the place where it rested on the floor; that he permitted his feet or one of his feet to slip off the ladder; that he failed to maintain proper balance; that he fell or jumped from the ladder. From such probative facts it would follow as a matter of law that plaintiff was guilty of negligence proximately contributing to his injury."

In the case at bar if we ignore the adjectives "negligently" and "carelessly" in the findings set forth in paragraph IX [Tr. pp. 143-145], there are findings of probative facts which necessarily result in the conclusion that the plaintiff was guilty of contributory negligence. Therefore, the findings do not support the conclusions of law that the plaintiff is entitled to a judgment against the appellant.

In addition to the foregoing comments the appellant contends that if this Honorable Court should hold that Plaintiff's Exhibits 6 and 7 were properly admitted in evidence, then all of the allegations contained in the special defenses set forth in Plaintiff's Exhibit 7 are true, for the reason that plaintiff offered no evidence contradicting the allegations "That on or about the 24th day of March, 1940, the plaintiff so negligently, carelessly and recklessly conducted herself while in the United Artists Theater in the City of Los Angeles, California, immediately prior to and at the time she seated herself in a certain seat in said theater, that any injury or damage

sustained by plaintiff was a proximate result of said negligence, carelessness and recklessness on her part; and that the plaintiff was an excessively obese person and that the said plaintiff was fully aware of the fact that her weight exceeded by a very great number of pounds the weight of the average person and the said plaintiff, at all times knew or should have known that seats in theatres and places of public accommodation are designed for the purpose of accommodating persons of normal size and normal and near normal weight and the plaintiff knew, at all times, that no seat in any theater was designed for the purpose of accommodating a person of the grossly excessive weight and size as the plaintiff and with knowledge of all of the said facts, the plaintiff failed to use a certain seat in defendant's theatre in a manner commensurate with her excessive weight and excessive size and by reason thereof the plaintiff tore said seat apart and broke the same and the said plaintiff assumed any and all risk of injury which might ensue by reason of her failure to make proper allowance for the fact that she was using a seat which was not and could not have been designed for the accommodation of a person of the size and weight of the plaintiff." [Tr. pp. 98-99.]

The testimony of defendant's witness Cheney, hereinbefore set forth, is conclusive proof of the fact that the plaintiff misused the seat and broke the metal parts thereof by subjecting said metal parts to extraordinary stress and strain, which such parts were not designed or intended to withstand.

It is respectfully submitted that the findings upon the subject of contributory negligence do not support the conclusions of law and that the said findings are contrary to the evidence in the case.

Conclusion.

Appellant respectfully submits that the judgment of the District Court should be reversed.

Dated: Los Angeles, California, July 29, 1942.

LASHER B. GALLAGHER,

Attorney for Appellant, Fox West Coast Agency Corporation, a Corporation.

APPENDIX.

Plaintiff's Exhibit No. 5.

"This Agreement made and entered into this 20th day of September, 1937, by and between Fox West Coast Theatres Corporation, a Delaware corporation (hereinafter referred to as 'West Coast'), Grauman's Greater Hollywood Theater, Inc., a California corporation (hereinafter referred to as 'Grauman's Greater Hollywood'), United West Coast Theatres Corporation, a California corporation (hereinafter referred to as 'United West Coast'), United Artists Theatre Circuit, Inc., a Maryland Circuit'), United Artists Theatres of California, Ltd., a California corporation (hereinafter referred to as 'United Artists'), Fox West Coast Agency Corporation, a Delaware corporation (hereinafter referred to as 'Agency'), and United Artists Theatre Corporation of Los Angeles, a California corporation (hereinafter referred to as 'Los Angeles United Artists') [13]

Witnesseth:

Whereas, West Coast is the sublessee of the Loew's State Theatre, Los Angeles, California, for a term ending at the close of business on August 31, 1945; Grauman's Greater Hollywood is the ground lessee of the Grauman's Chinese Theatre in Hollywood, California, for a term ending at the close of business on January 31, 2023; United West Coast is the sublessee of the Four Star Theatre located near the corner of Wilshire Boulevard and Mansfield Avenue, Los Angeles, California, for a term ending at the close of business on December 31, 1938, and which term will be extended so that it will expire on March 31, 1947; Los Angeles United Artists is the lessee

of the United Artists Downtown Theatre at 933 South Broadway, Los Angeles, California, for a term ending at the close of business on December 31, 1957; and United Artists is the sublessee of the United Artists Downtown Theatre at 933 South Broadway, Los Angeles, California, for a term ending at the close of business on March 31, 1947; and

Whereas, West Coast is the owner of thirty-three and one-third per cent. (33⅓%) of the outstanding capital stock of Grauman's Greater Hollywood and is also the owner of all the outstanding Class 'A' stock of United West Coast; and

Whereas, United Artists Circuit is the owner, directly or indirectly, of sixty-six and two-thirds per cent. (66⅔%) of the outstanding capital stock of Grauman's Greater Hollywood, is the owner of all of the outstanding capital stock of Los Angeles United Artists and is the owner of all of the outstanding stock of United Artists which owns all of the outstanding Class 'B' stock of United West Coast; and

Whereas, the parties hereto desire to consolidate the operation of the theatres above referred to under the sole management and direction of Agency: [14]

Now, Therefore, This Agreement Witnesseth:

That in consideration of the premises and of the sum of One Dollar ($1.00) lawful money of the United States of America by each party to the other in hand paid, receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, it is hereby covenated and agreed by and between the parties hereto, each in respect of its own covenants and agreements, and

not in respect of the covenants and agreements of any of the others, as follows:

1. Grauman's Greater Hollywood, United West Coast, Los Angeles United Artists and United Artists, and West Coast, respectively, hereby surrender to and vest in Agency the management of the Chinese, Four Star, United Artists Downtown and Loew's State theatres (said four theatres being hereinafter sometimes collectively referred to as 'the theatres'), but excluding any so-called commercial or non-theatre portion, if any, of the theatres or of the buildings in which they are located. All furniture, fixtures, equipment and personal property located in the theatres and used or useful in the operation thereof, shall remain in the theatres subject to the control of Agency. Agency shall manage and operate the theatres for the joint benefit of the parties hereto, and as such manager or operator shall have, among other things, the sole right and authority, and obligation as agent for the other parties hereto, (a) to select, purchase, license, lease and/or book motion pictures to be exhibited in the theatres; (b) to employ the personnel which in the opinion of Agency may be necessary for the successful operation of the theatres, including a local manager for each of the theatres and one 'district manager' for all of the theatres; and (c) to keep all books of accounts and records pertaining to the operation of the theatres. Agency from time to time may change the respective operating policies of the theatres or of any one or more of them to include or exclude stage shows or other similar attractions, provided the written [15] consents of West Coast and United Artists Circuit shall have first been obtained, and in the event that the operating policy of any theatre is so changed, Agency

shall have the sole right and authority and obligation as agent for the other parties hereto, to select, procure, purchase, license, lease and/or book such stage shows or other attractions for exhibition in such theatre. Agency may also from time to time close and thereafter re-open any of the theatres provided the written consents of West Coast and United Artists Circuit shall have first been obtained and in such event the parties hereto shall use their best efforts to dispose of any motion pictures purchased, licensed and/or leased for exhibition in such theatre or theatres during the period that the same may be closed, if such motion pictures are not needed in connection with the operation of any of the other theatres, and the gain or loss resulting from such disposition of motion pictures shall be credited or charged, as the case may be, as operating income or expense.

2. For its services hereunder, Agency shall receive an amount equal to five and one-quarter per cent (5¼%) of the gross income of the theatres, which amount shall be paid to it as hereinafter in subdivision (a) of Section 3 provided. For the purposes of this agreement the term 'gross income' shall mean the sum of the gross theatre box office receipts, and all other receipts of whatsoever nature derived from the operation of the theatres, less the amount of theatre admission taxes imposed by any governmental authority having jurisdiction. The term 'gross income' shall not include any booking fees or agency charges based on and deducted from the salary of any performers in the theatres, or any of them, and it is understood and agreed that Agency, or any corporation subsidiary to or affiliated with it, may charge and retain such amounts from performers' salaries without accounting therefor to any of the parties hereto.

3. During the term of this agreement, Agency shall collect the [16] gross income of the theatres, and shall deposit the same in a separate bank account (hereinafter referred to as the 'Operating Account'), it being expressly understood and agreed that all funds in the Operating Account shall be held in trust for the joint benefit of West Coast and United Artists Circuit. From the funds so deposited, but only from such funds and not otherwise, Agency shall be obligated to pay the following:

(a) First, to Agency on Monday of each week an amount equal to five and one-quarter per cent. (5¼%) of the gross income of the theatres (hereinabove in Paragraph 2 defined) during the preceding week, commencing July 1, 1937; it being understood and agreed that the payments to Agency shall be an amount equal to three per cent. (3%) of such gross income for all periods prior to July 1, 1937.

(b) Second, on the first day of each month, commencing April 1, 1937:

To United West Coast Nine Hundred Twenty-three Dollars and Twenty-five Cents ($923.25) as rental for the Four Star Theatre;

To Grauman's Greater Hollywood Seven Thousand Two Hundred Ninety-one Dollars and Sixty-seven Cents ($7,291.67) as rental for the Chinese Theatre;

To West Coast Thirteen Thousand Four Hundred Eighty-six Dollars and Eleven Cents ($13,486.11) as rental for the Loew's State Theatre;

To United Artists Six Thousand Five Hundred Dollars ($6,500.00) as rental for the United Artists Downtown Theatre.

(c) Third, all other operating expenses of the theatres, as and when the same shall be due. The term 'operating expenses' shall have the meaning ordinary att*irub*ted to it in proper accounting practice applicable to the motion picture theatre business, and shall include, without limiting the generality of the foregoing (and in addition to [17] the expenses referred to above in subdivisions (a) and (b) of this Section 3), film rentals, cost of stage shows and other attractions, if any, service charges and rent on sound equipment, charges for heat, water, gas, light and power, salaries and wages of persons employed in the operation of the theatres, including, without limitation, a local manager for each of the theatres and one district manager for all of the theatres (provided that the duties of said district manager shall be limited to the supervision, under the direction of Agency, of the management and operation of the theatres), social security taxes paid by the employer, cost of advertising, minor repairs, audits by independent certified public accountants, and premiums on public liability insurance, but shall specifically exclude allowances for depreciation and obsolescence and (except in the case of the Four Star Theatre) taxes and assessments and premiums on fire insurance. With respect to the Four Star Theatre there shall be included in the 'operating expenses' and paid to United West Coast from the operating account, such taxes and assessments and such premiums on fire insurance covering the building and equipment as the sublessee is required to pay with respect to such theatre under the present sublease (and under any renewals or extensions thereof) between United Artists, as sublessor, and United West Coast, as sublessee, as and when such taxes and assessments and insurance premium shall be due and payable by United West

Coast. Taxes and assessments upon, and premiums on fire and earthquake insurance, if any, covering each of the theatres (except the Four Star Theatre) shall be paid by the party holding said theatre under lease or sublease as in the first preamble of these presents set forth.

(d) Fourth, expenditures deemed by Agency in its sole discretion necessary in the operation of the theatres, or any one or more of them, other than 'operating expenses', as such term is herein defined and other than services specifically excluded from the definition of 'operating expenses', hereinabove set forth, provided, [18] however, that the aggregate amount of such expenditures shall not exceed One Thousand Dollars ($1,000.00) for any one theatre during any period of six (6) consecutive months without the written consent of West Coast and United Artists Circuit having first been obtained.

Except as provided in this subdivision (d) of this section no expense can be charged against any party without its consent for repairs, renewals or equipment to a theatre or theatres held by such party, and except as provided in this subdivision (d), no expenditures from the Operating Account for purposes other than those included in subdivisions (a), (b) and (c) of this section may be made without the written consent of West Coast and United Artists Circuit.

(e) The balance of gross income, if any, remaining after the payment, or provision for payment, all in accordance with proper accounting practice applicable to the motion picture threatre business, of the items listed in subdivisions (a), (b), (c) and (d) of this Section 3, shall be termed 'net profits', and such net profits shall be distributed by Agency within twenty (20) days after the

close of the next current fiscal accounting quarter, and quarter-annually thereafter (or on such other dates and for such other periods as may be mutually agreed upon in writing by West Coast and United Artists Circuit) one-half thereof to West Coast and one-half thereof to United Artists Circuit.

4. In the event that during the period of this agreement United West Coast, as the sublessee of the Four Star Theatre, or Grauman's Greater Hollywood, as the ground lessee of the Chinese Theatre, or West Coast, as the sublessee of Loew's State Theatre, shall obtain a reduction in the rental payable by it under the terms of its lease or sublease, the amount payable hereunder as rental for any such theatre shall be reduced for the period and in the amount of such rent reduction.

In the event that during the period of this agreement the total rent paid for the United Artists Downtown Theatre by Los Angeles [19] United Artists to Ninth and Broadway Building Co., or to its successors or assigns as lessor, shall be diminished or reduced to an amount less than Six Thousand Five Hundred Dollars ($6,500.00) per month, whether by agreement or otherwise, the amount payable hereunder to United Artists as rental for said threatre, shall be reduced for the period and in the amount of such rent reduction.

5. Prior to the execution of this agreement, West Coast and United Artists Circuit have each deposited in the Operating Account hereinabove referred to, the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) to be employed in the operation of the theatres. The funds so deposited in the Operating Account may be used in the making of any of the payments referred to in

subdivisions (a), (b) and (c) of Section 3 and, to the extent herein provided, in the making of any of the payments referred to in subdivision (d) of Section 3. If at any time during the term of this agreement, the Operating Account shall be depleted below the sum of Twenty-five Thousand Dollars ($25,000.00) Agency shall forthwith notify West Coast and United Artists Circuit of such fact and of the amount of such depletion, and within twenty (20) days after the giving of such notice, West Coast and United Artists Circuit shall each pay to Agency for deposit in the Operating Account fifty per cent. (50%) of the amount required to restore the amount on deposit in the Operating Account to the sum of Twenty-five Thousand Dollars ($25,000.00), it being the intention that fifty per cent. (50%) of the losses, if any, incurred in the operation of the theatres, shall be borne by United Artists Circuit and fifty per cent. (50%) by West Coast.

6. During the term of this agreement, Agency as agent for the parties hereto, shall effect and maintain in full force and effect public liability insurance covering each of the theatres and the appurtenances thereto in the amount of Fifty Thousand Dollars ($50,000.00) covering injuries to one person in any one accident and in the amount of Five Hundred Thousand Dollars ($500,000.00) [20] covering injuries to more than one person in any one accident, such insurance to be for the benefit of Agency and the particular party hereto holding under lease or sublease the theatre covered by insurance as their interests may appear. Agency shall be obligated to pay from the Operating Account, but not otherwise, the premiums payable upon such public liability

insurance as and when such premiums shall be payable under the terms of said contracts of insurance. Anything hereinabove to the contrary notwithstanding, it is expressly understood and agreed (and the mutual obligation of West Coast and United Artists Circuit to bear fifty per cent. (50%) of the losses as above provided is expressly limited hereby) that the amount of any liabilities arising out of any accident or accidents to persons or property in excess of the amount of all public liability insurance available for the satisfaction of such liabilities, shall be borne and discharged solely by the particular party holding, under lease or sublease as in the first preamble of these presents set forth, the particular theatre in which such accident or accidents shall have occurred.

7. Within ten (10) days after the termination of this agreement, the amount, if any, remaining in the Operating Account after payment, or provision for payment, of all payments provided for in subdivisions (a), (b), (c) and (d) of Section 3 hereof shall be distributed to West Coast and United Artists Circuit, fifty per cent. (50%) to each (or as their respective interests may appear in the event of the failure of either of said parties to make any payment or payments required to be made hereunder.)

8. It is understood and agreed that the provisions of this agreement become effective as of April 1, 1937, unless otherwise provided herein, and that the term of this agreement is from April 1, 1937 to March 31, 1947.

9. It is understood and agreed that this agreement may not be assigned by any of the parties hereto without the written consent [21] of all of the other parties, provided, however, that Agency may assign all of its rights, powers and privileges under this agreement to any cor-

poration subsidiary to West Coast and organized and equipped to perform similar services, upon condition that such assignee shall assume and agree to perform all the obligations of Agency hereunder, and upon such assignment and assumption Agency shall be relieved from any further liability under this contract except, with respect to all the period prior to such assignment, to account for the gross income and the Operating Account. The term 'subsidiary' or 'subsidiary company' whenever used in this section means any corporation fifty per cent. (50%) or more of the outstanding capital stock of which having voting power is at the time owned by West Coast, or any parent company of West Coast, either directly or through one or more intermediaries.

10. If at any time or times during the term of this agreement one of the theatres shall be destroyed or damaged to an extent rendering it unfit for use as a motion picture theatre, by fire, earthquake or other casualty, the monthly sum required to be paid on account of the rental for such theatre under the provisions of subdivision (b) of Section 3, shall not be required to be paid from and after the date of such destruction or damage; provided, however, that if such theatre shall be restored to its former condition during the term of this agreement, such monthly payments shall re-commence as of the date such restoration is completed. The destruction of or any damage to any of the theatres (if less than all of the theatres) shall not otherwise affect this agreement or the obligations of the parties hereunder.

11. During the term of this agreement Agency shall render to West Coast and United Artists Circuit:

(a) Daily statements of box office receipts of each of the theatres.

(b) Weekly statments showing receipts, disbursements [22] and expenses of and for each of the theatres for the preceding week.

(c) Annual profit and loss statements with respect to the operations of the theatres, duly certified by a reputable firm of Certified Public Accountants.

(d) Such other information with respect to the operation of the theatres as may reasonably be required by West Coast or United Artists Circuit.

It is understood and agreed that the dates of the rendering of the weekly and annual statements referred to in (b) and (c) above, and the particular weekly or annual periods respectively covered thereby, may correspond with the dates and periods of similar weekly and annual statements prepared by Agency in the usual course of its business for other theatres managed or supervised by it, appropriate adjustments being made to cover any portion of a week or of a year which may be unaccounted for by reason of the relation of such dates and periods to dates of the commencement and termination of this agreement.

12. The parties hereto acknowledge that the theatres referred to in this agreement have, since on or about November 14, 1934, been operated substantially in accordance with the provisions of this agreement except that the rentals paid for the various theatres have not been the rentals provided to be paid under the terms hereof. In this connection all the parties hereto acknowledge and agree:

First: That all rentals to be paid up to and including March 31, 1937 have been paid and that no party is entitled to any rentals on account of any period prior to April 1, 1937.

Second: That after the deduction of the rentals heretofore paid, and charges and expenses computed in accordance with the provisions of this agreement, [23] and particularly Section 3 hereof (except that the deduction representing the charges for the service of Agency as set forth in Section 3 (a) hereof shall be an amount equal to three per cent. (3%) of the gross income of the theatres up to and including June 30, 1937), West Coast and United Artists Circuit are each entitled to one-half of the net profits arising from the operation of such theatres and all of them from November 14, 1934, to April 1, 1937.

Third: In an event any dispute should arise between any of the parties hereto relating to any matter or thing in connection with the operation of the theatres or any of them since November 14, 1934, the provisions of this agreement shall be determinative and shall apply to such matter or thing with the same force and to the same extent as though this agreement had then been in operation.

13. In the event that at any time during the term of this agreement the Four Star Theatre shall not be used for the purpose of exhibiting first-run motion picture productions, said Four Star Theatre may, at the election of West Coast, and upon ten (10) days notice in writing to United Artists Circuit and United West Coast, be excluded from the operation of this agreement. After the effective date of such notice the operations of said Four Star Theatre shall revert to United West Coast; provided, however, that if thereafter at any time or from time to time said Four Star Theatre shall be used for the exhibition of first-run motion picture productions, the op-

eration of such theatre may, at the election of United Artists Circuit, upon ten (10) days notice in writing to West Coast and United West Coast, be reincluded in this agreement during such period or periods as said theatre shall so be used, and may similarly from [24] time to time at the election of West Coast, upon ten days notice in writing to United Artists Circuit and United West Coast, be excluded from the operation hereof during such period or periods as it shall not be so used.

14. United Artists and United West Coast agree that prior to the expiration of the term of the sublease of the Four Star Theatre from United Artists to United West Coast, said sublease will be extended on the same terms and conditions as are now contained therein (provided, however, that such terms and conditions may be modified or changed in accordance with any modifications or changes made of or in a certain agreement between West Coast and United Artists, dated September 1, 1933) so that it will expire March 31, 1947.

15. Reference is hereby made to that certain agreement executed in duplicate at Los Angeles, California, the first day of September, 1933, by and between said Fox West Coast Theatres Corporation, therein referred to as 'Fox' and said United Artists Theatres of California, Ltd., therein referred to as 'United'. Anything herein to the contrary notwithstanding, this agreement may be terminated and declared to be of no further force or effect whatsoever at the option of either West Coast or United Artists Circuit upon any termination of said agreement

dated September 1, 1933, or any extension or renewal thereof. Such option shall be exercised prior to the expiration of thirty (30) days from and after any termination of said agreement dated September 1, 1933, by notice in writing served upon all the other parties hereto. Said written notice shall specify the date upon which this agreement shall terminate, which termination date shall be not more than thirty (30) days from and after the date of such notice.

16. Nothing herein is intended or shall be construed so as to create a partnership between or among the parties hereto, or to make any of the parties hereto a partner of any other or all of the remaining parties hereto. [25]

17. All notices, orders or demands of any kind which any party hereto may be required or may desire to serve on any other party hereto under the terms of this agreement may be served (as an alternative to personal service or delivery to such party) by mailing the same by registered United States mail, addressed as follows:

To Fox West Coast Theatres Corporation at 1609 West Washington Boulevard, Los Angeles, California.

To Grauman's Greater Hollywood Theater, Inc., at 1501 Broadway, New York, New York.

To United West Coast Theatres Corporation at 1609 West Washington Boulevard, Los Angeles, California.

To United Artists Theatre Circuit, Inc., at 1501 Broadway, New York, N. Y.

To United Artists Theatres of California, Ltd., at 1609 West Washington Boulevard, Los Angeles, California.

To Fox West Coast Agency Corporation at 1609 West Washington Boulevard, Los Angeles, California.

To United Artists Theatre Corporation of Los Angeles at 1501 Broadway, New York, New York,

or such other place as the parties hereto may designate from time to time in writing. Service shall be deemed complete within seven (7) days after such mailing.

18. This agreement is made solely for the benefit of the parties hereto and shall not be construed to render Agency liable to any person, firm or corporation other than the parties hereto, nor to render Agency liable for the payments referred to in subdivisions (b) or (c) and (d) of Section 3 hereof, except as in said Section 3 provided, and except for the obligation of Agency to account for the gross income and the Operating Account. [26]

In Witness Whereof, the parties hereto have subscribed their respective corporate names and affixed their respective corporate seals by their officers thereunto duly authorized, all as of the day and year first above named.

(Seal) Fox West Coast Theatres Corporation,

By W. C. Nickel
Vice President

Attest:

John P. Edmundson
Asst. Secretary

GRAUMAN'S GREATER HOLLYWOOD THEATRE, INC.,

By JOSEPH M. SCHENCK
President

Attest:

T. J. HEALY
Secretary

UNITED WEST COAST THEATRES CORPORATION,

By CHARLES P. SKOURAS
President

Attest:

ALBERT W. LEEDS
Secretary

UNITED ARTISTS THEATRE CIRCUIT, INC.,

By WM. P. PHILIPS
Vice-President

Attest:

BERTRAM S. NAYFACK
Secretary

(Seal) UNITED ARTISTS THEATRES OF CALIFORNIA LTD.,

By JOSEPH M. SCHENCK
President

Attest:

LOU ANGER
Secretary

(Seal) Fox West Coast Agency Corporation,

By Charles P. Skouras
President.

Attest:

Albert W. Leeds
Secretary [27]

(Seal) United Artists Theatre Corporation of Los Angeles,

By Joseph M. Schenck
President

Attest:

Bertram S. Nayfack
Secretary